

82 - 1804

Office-Supreme Court, U.S.

FILED

MAY 4 1983

ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

IRENE D. MUELLER,

PETITIONER,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE,

RESPONDENT,

PEOPLE OF THE STATE OF CALIFORNIA,

REAL PARTY IN INTEREST.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRENE MUELLER
1311-B S. Anaheim
Anaheim, California
92805

In Pro Per

(714) 772-5120

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner's Due Process Rights were violated by law enforcement's intentional failure to preserve material evidence.

TABLE OF CONTENTS

Questions Presented for Review . .	i
Opinion Below.	1
Jurisdiction	1
U.S. Constitutional Amendments . .	2
Statement of the Case	3
Argument	4
Conclusions	16
Appendices	
Appendix A - Trial Testimony of Officer Kenny . .	17
Trial Testimony of Dr. Pennock . . .	39
Appendix B - Petition of Writ of Habeas Corpus by a Person in State Custody . .	45
Appendix C - Order to Show Case	57
Appendix D - Petitioner's Objections and Points and Authorities. . . .	61
Appendix E - Return to Petition for Writ of Habeas Corpus . .	109

TABLE OF CONTENTS (Continued)

Appendix F - Petitioner's Objections and Points and Authorities . . .	117
Appendix G - Engrossed Statement on Appeal	129
Appendix H - Order Denying Motion to Dismiss	139
Appendix I - Application for Certificate of Probable Cause. .	145
Appendix J - Judgment (Proposed)	153
Appendix K - Findings on a Petition for Writ of Habeas Corpus by a Person in State Custody . .	157
Appendix L - Notice of Appeal.	169
Appendix M - Judgment.	171
Appendix N - Order	177
Appendix O - Order Denying Application for Certificate of Probable Cause. .	181
Appendix P - Order	185

TABLE OF AUTHORITES

Table of Cases

<u>Chapman v. Cal.</u> 386 U.S. 18	8
<u>In Re Imbler</u> 60 Cal.2d 554	13
<u>In Re Jesus B</u> 75 Cal.App.3d 44	13
<u>People v. Hitch</u> 12 C.3d 641	10
<u>People v. Ruthford</u> 14 Cal.3d 399	8
<u>Pyle v. Kansas</u> 317 U.S. 213.	9
<u>U.S. v. Bryant</u> 439 F.2d 642.	7

OPINION BELOW

There was no official or unofficial report published by the U.S. District Court - Central District of California.

JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is involved are:

(i) The date that the judgment which is sought to be reviewed was entered in February 9, 1983, by the United States Court of Appeals for the Ninth Circuit.

(ii) The U.S. District Court Central District of California denied petitioner's Writ of Habeas Corpus November 4, 1982.

(iii) Petitioner exhausted all her State remedies before filing the Federal Writ of Habeas Corpus, pursuant to 28 §2254(b). Petitioner is in constructive custody of the State of California, i.e., informal probation.

(iv) The statutory provision conferring jurisdiction on this Honorable Court is 28 §1254 which provides:

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

UNITED STATES CONSTITUTIONAL

AMENDMENTS INVOLVED

Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws."

STATEMENT OF CASE

1. On May 21, 1982, Petitioner filed a Federal Writ of Habeas Corpus by a person in state custody, alleging that her due process rights under the Fourteenth Amendment were violated.

2. Petitioner was convicted of petty theft and assault and battery. A material witness observed the petty theft and the assault. The witness gave his business card to law enforcement who then failed to preserve it.

3. The Honorable Judge Thompson denied Petitioner's pre-trial motion to dismiss for failing to preserve material evidence on the grounds that there was not enough evidence to show that the witness had observed Petitioner place money on a counter. However, Judge Thompson sited that the witness was material as to the

assault and battery.

4. Petitioner filed the Writ of Habeas Corpus pursuant to 28 § U.S.C. Section 2254(d) stating: "that the material facts were not adequately developed at the state court hearing.

5. The U.S. District Court Central District of California denied Petitioner's Writ of Habeas Corpus November 4, 1982 - U.S. Court of Appeals for the Ninth Circuit denied Petitioner's review February 9, 1983.

REASONS FOR GRANTING THE WRIT

PETITION AND THE RECORD SHOWS
THAT PETITIONER'S DUE PROCESS
RIGHTS WERE VIOLATED BY LAW
ENFORCEMENT'S FAILURE TO PRESERVE
MATERIAL EVIDENCE

Petitioner has met her burden of showing that the state fact-finding process was deficient. Her petition does

focus on the inadequacy of the pre-trial ruling denying her motion to dismiss because the ruling prevented her from producing a material witness. Without the material witness, petitioner was denied her due process right of producing favorable evidence that might have exculpated her of the alleged criminal charges. People v. Kiihoa, 53 Cal.2d 748, 3 Cal. Rptr. 1.

Respondent asserts in her return that 28 U.S.C. section 2254(d) presumes that the municipal court's conclusion is correct. However, respondent failed to recite the entire relevant section of 2254(d). Respondent left out the portion of 28 U.S.C. section 2254(d) which states:

"...written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant can establish or it shall otherwise appear, or the respondent shall admit.

1. that the merits of the factual dispute were not resolved in the

State court hearing;

2. that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

3. that the material facts were not adequately developed at the State court hearing; (emphasis added)

Etc.

It is petitioner's contention that the pertinent facts concerning the materiality of the business card of the material witness were not adequately developed at the State court hearing. In support of the rebuttal, petitioner has attached a copy of the trial transcripts showing the relevant testimony of the police officer in connection with the business card. The testimony of the police officer distinctly makes clear that the business card contained not only the name of the witness, but also his address and telephone number (page 23, lines 7 - 12). Therefore, showing that the State

court Judge's findings and conclusions were not made upon all the "credible evidence" adduced at the evidentiary hearing.

The crux of petitioner's argument is not the failure of law enforcement to acquire the name of the witness, but the failure of law enforcement to preserve a business card containing the name, address, and telephone number of a person who actually observed the entire incident. In United States v. Bryant, 439 F.2d 642, 651, it was ruled that government has a duty to preserve evidence that is material. "Hence, we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation. (emphasis added) And if government is violative of that duty, it is a denial of that defendant's due process rights.

Under California law, it does not

make any difference whether the material evidence that is suppressed is done so willfully, negligently, or inadvertently when it is done by a state agent representative if the suppressed evidence affects directly the question of guilt, the degree or amount of prejudice is not to be weighed or measured by the federal harmless error rule or Chapman v. California, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824; if the suppressed evidence affects directly the question of guilt, the sole question is materiality, and if found material, the judgment of conviction must be reversed.

In People v. Ruthford, 14 Cal.3d 399, 406, Chief Justice Wright, speaking for a unanimous Court, said:

"We note, preliminarily, that when the evidence is suppressed or otherwise made unavailable to the defense by conduct attributable to the State bears directly on the question of guilt our initial inquiry is whether such conduct resulted in denial of a fair trial. If so, the

judgment of conviction must be reversed without weighing the degree of the prejudice to the accused. (Pyle v. Kansas, 1942) 317 U.S. 213, 216 87 L.Ed 214, 216, 63 S.Ct. 177; In Re Imbler (1963) 60 Cal.2d 554, 567 (35 Cal. Rptr. 293, 387 P.2d 6) wherein we stated: 'Moreover, suppression by the State of material evidence alone deprives a defendant of due process of law. It is necessary in such circumstances, of course, that the materiality of the evidence suppressed or otherwise not disclosed be examined in order that we may judge whether an accused has been fairly tried, but that examination is one which goes to the question of the evidence rather than prejudice to the accused.'

We conclude that the suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process within the meaning of the Fourteenth Amendment. Chapman v. California, (1967) 386 U.S. 18, 24 (17 L.Ed. 2d 705, 710-711, 87 S.Ct. 824)."

In the case at bar, investigating Officer Kenney was given a business card by Witness containing at least the name of a material witness to the incidences that arose between the petitioner and the security guard. Officer Kenney has stated

at trial that the business card contained all the essential requirements to make the card material: name, address (page 23, lines 7 - 12) and phone number.

The card was given to the police officer and then mysteriously disappeared. Thereby, depriving petitioner of an essential part of her defense and also has denied her due process rights under the Fourteenth Amendment of the United States Constitution.

In People v. Hitch, 12 C.3d 641, set forth the governing principles concerning the loss or destruction of evidence by law enforcement. The Court first adopted a standard for determining whether the evidence is sufficiently important to require that it be preserved and made available to the defendant. The Hitch Court adopted a standard similar to that applicable when a defendant seeks to discover the identity of a confidential

informant. The Court held that evidence must be preserved and disclosed if "there is a reasonable possibility that (it) would constitute favorable evidence on the issue of guilt or innocence (12 C.3d at p. 649, emphasis added)."

In the present case, witness left his card, containing his name, with the investigating police officers, but the card was lost or misplaced by the officer. The material witness informed the police officers that he observed other events besides the assault and battery - i.e., petitioner placing the money on the counter. (Page 36, lines 15) The witness' potentially favorable testimony was thereby lost to appellant for trial (page 36, lines 15-21).

Respondent argues that petitioner should have ascertained the name and address of the witness because she had a personal involvement with him for

approximately twenty minutes. Respondent, however, fails to consider human frailties. Petitioner had just been assaulted and battered; consequently, she was suffering from extreme physical and mental injuries. Petitioner had just been charged with committing a crime; consequently, she was extremely frightened and nervous. Probably the most important factor that respondent does not mention is the fact that petitioner was placed under arrest. Therefore, she was in custody, her freedom was extremely restricted.

Respondent argues that police officers have no obligation to maintain contact with a non-informant witness which might be favorable to the defense. However, that is not the issue. The issue is not a case of the investigating officer's neglect to obtain the name of the witness, but the failure to preserve the name of the witness once obtained.

In People v. Hernandez, (1978) 84 Cal.App. 408, 411, the court stated that "the police should refrain from conduct which makes the non-informant material witness unavailable". In petitioner's case, law enforcement engaged in conduct that led to the unavailability of the material witness. Law enforcement received a business card from a material witness and then intentionally or unintentionally lost it. Again, the issue is not gathering of material evidence but the failure to preserve material evidence.

Respondent also cites In Re Jesus B (1977) 75 Cal.App.3d 444 in her return. Again, respondent confuses the main issue. The issue is not law enforcement serving as defense investigators, but as distinctly stated in In Re Jesus B. supra (448), the issue is: "the prosecution depriving an accused of the opportunity to present material evidence which might

prove his innocence."

In In Re Jesus B., supra (450), the court delineated standards to determine whether the people have a duty to assure the presence of a witness. The court stated: "However, the People are not required to do everything possible to assure the witness' presence in order to fulfill their obligation. All that is required is to take those steps as appear reasonably calculated under the circumstances to assure his presence. The totality of the efforts to assure the presence of a material witness must be considered, including the character of the official acts taken, the degree of control exercisable over the witness, and such matters as whether the prosecutor reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him."

Applying the first standard to

petitioner case, law enforcement official act was to take the business card from the material witness. Law enforcement officer was on official duty. In regards to the second standard, law enforcement received the business card from the material witness. The business card contained the name, address, and telephone number of the witness. Consequently, one can clearly see that the law enforcement officers exercised total control over the witness. Lastly, it was very reasonable to believe that the witness would appear willingly because the officer had talked to the material witness concerning the incident. The police officer testified the material witness spoke of observing "other things" - consequently, the only other thing was petitioner placing money on the counter. The material witness willingly gave the business card to the police officer. Therefore, the officer did ascertain the

intent of the material witness. The
material witness' intent was that of
wanting to testify on behalf of
petitioner. (Page 10, line ?)

CONCLUSION

It is respectfully submitted that Petitioner has sustained her burden and has rebutted the presumption of the correctness of the State Court findings.

Accordingly, the Petitioner respectfully urges that this Honorable Court order a Writ of Habeas Corpus.

Respectfully submitted,

IRENE MUELLER

APPENDIX A

TRIAL TESTIMONY OF OFFICER KENNY

MUNICIPAL COURT OF THE ORANGE COUNTY CENTRAL JUDICIAL DISTRICT
COUNTY OF ORANGE, STATE OF CALIFORNIA
DEPARTMENT NO. 313 HON. KARL C. FRANK, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
) Plaintiff,)
)
) vs) No. 79C M00607
)
) IRENE DOROTHY MUELLER,)
)
) Defendant.)

REPORTER'S TRANSCRIPT ON APPEAL
November 3, 4, 5, 6, 7, 10, 1980

APPEARANCES:

For the People: CECIL HICKS, District Attorney
BY: DAVID W. POMEROY
Courthouse
P. O. Box 808
Santa Ana, California 92701

For the Defendant: GILES, CALLAHAN, McCUNE, WILLIS & EDWARDS
BY: ALAN J. OLSON
17321 Irvine Boulevard
Tustin, California 92680

COPY

William H. Burgess, Jr.

Certified Shorthand Reporter
410 WEST CHAPMAN, SUITE C
PLACENTIA, CALIFORNIA 92670
(714) 525-4357

VOLUME 2 of 3

Pages 215 through 399

APPENDIX A

A Yes, sir, I did.

Q Who was that?

A The woman sitting at the end of the table.

MR. POMEROY: Indicating the defendant, your Honor.

Q Did you observe any visible marks or bruises or any kind of visible evidence of injury?

A No sir, I did not.

Q For approximately how long were you there in the security office?

A Approximately 15 minutes

Q During that time, did you have any conversation with the lady seated at the end of the counsel table?

A Not that I recall, sir.

Q During that time did she ever complain of any pain or injury or bruise or anything?

A No, sir.

Q Did she request any medical assistance?

A No, she did not.

Q Officer, was -- were there any men there in the security office?

A Not in the security office, no.

Q Did you see any men in that area?

A Just outside the security office.

Q And who was that, if you know?

A It was an elderly gentleman, I'd say maybe 55, 56 years old, to the best of my recollection.

Q Did you have any conversation with him?

A Briefly, yes, I did.

Q What was said in that conversation?

A To the best of my recollection, he said that he was outside in the mall area and he observed a fight between what was later to his knowledge a security guard and the woman sitting at the end of

the table.

Q Did he say who had attacked whom?

A No, he did not.

Q Did he state any intention of what he wanted to do or anything like that, where he wanted to go?

A He said that he was -- if there was any further questions he gave me his business card and with his telephone number on it, and I told him that another officer would be taking the report and would contact him.

Q Did he say where he was going?

A Just to work.

Q Did you ask him to leave?

A I believe he asked if he could leave and I said yes.

Q To your knowledge, did anybody tell him to leave?

A No, sir.

Q What did you do with that business card?

A I gave it to Officer Scott Staton.

Q And was Officer Staton there at that time?

A No, he was not.

Q So what did you do with the card until Officer Staton arrived?

A Clipped it to my pen on my shirt, uniform shirt.

A No, I did not.

Q Not even for weapons in her purse?

A No, I did not.

Q Did someone else conduct a search prior to your arrival?

A Not that I know of, no.

Q But the alleged stolen items were already out of her purse?

A Yes, sir, they were.

Q Where were they?

A They were on the desk of the security office.

Q How many of them were there?

A I believe there was three or four items.

Q Do you know Carol Manstrom?

A Yes, sir, I do.

Q Did you know her quite well at that time?

A Just from responding to that type of call in the area.

Q How many times had you responded to her requests?

A I would estimate maybe 10 or 12 times.

Q Would you say you had a friendly relationship with Carol Manstrom?

A Yes.

Q Are you familiar with Carol Manstrom's law-enforcement-oriented training?

MR. POMEROY: Objection; that's a misstatement of the evidence, your Honor.

THE COURT: Well, do you have any

information that she does have any law-enforcement-oriented training?

THE WITNESS: I know she was going to Long Beach State and was taking criminal justice classes there.

THE COURT: I will sustain the objection. This question and answer will remain.

Q BY MR. OLSON: Do several officers from your department know Carol Manstrom?

A I don't know how many would know her. I have no idea.

Q Do you know if anyone else does?

A I would believe that, you know, officers responding out here that work the area at different times in Orange.

Q Do you know an Officer Dieball?

A Yes, I do.

Q Do you know if he knows Irene --
I mean Carol Manstrom?

A I believe he does, yes, sir.

Q Do you know if he enjoys a special relationship with Carol Manstrom?

MR. POMEROY: Objection; irrelevant.

THE COURT: Overruled.

THE WITNESS: I believe so, yes, sir.

Q BY MR. OLSON: Is he commonly known as her boyfriend?

A I don't know that, no.

Q Do you know whether or not Officer Dieball had dated Carol Manstrom prior to the incident?

A I believe so, yes, sir. I know that he has taken her out. I don't know whether it was before or after the incident.

Q Were you aware of their relationship on the day of the incident?

A No.

Q Who was the second officer to arrive on the scene?

A Officer Staton.

Q Who called Officer Staton?

A Dispatch did. It was originally his call.

Q Originally his call?

A Yes, sir.

Q But you arrived first, and why is that?

A I was working day shift and it was the end of the day shift and they asked that I respond out there, stand by until Staton, who was working swing shift, could come out.

Q What time does the day shift end?

A 3 o'clock.

Q This was about 2:30?

A I believe it was even later than that, because I was on my way into the station when I got the call.

Q What did you say you did with the business card of the gentleman?

A I clipped it to my shirt.

Q Did you give it to Officer Staton

when he arrived?

A Yes, I did.

Q Did you explain to him what it
was?

...

with him.

Q Well, would you recall if you had

--

A If I --

MR. POMEROY: Objection.

THE WITNESS: If I would recall, yes.

MR. POMEROY: Objection. That calls for speculation.

THE COURT: Well, what was your answer again?

THE WITNESS: I didn't recall being -- seeing him inside the security office.

MR. OLSON: His answer just now was, "Yes, I would remember."

THE COURT: All right. The the objection's overruled.

Q BY MR. OLSON: So then your answer is yes, I would remember.

Now, you do remember running into him outside of the security office. Is that correct?

A Yes, sir.

Q How far outside the security office? Was it in the store?

A It was in the package pickup area, which was --

Q Okay. And he was on his way out?

A He was standing there. I don't believe he was on his way out. He was just standing around.

Q Did he indicate that he was waiting for the police to arrive?

A He may have. I just recall talking to him about the incident.

Q But, in any case, he did give you his business card?

A Yes, sir, he did.

Q And said that he was a witness?

A To the incident outside, yes, sir.

Q Well, did he say he was a witness to the incident outside or just say he was a witness?

A He told me he had witnessed the

fight outside the store.

Q And nothing more?

A No.

Q And did you look at his business card?

A Yes, I did.

Q Do you recall what it said on his business card?

A The only thing that I can recall was that it had the word "doctor" in the front of his name.

Q Did it have an address?

A I believe it had an address somewhere in Irvine, to my recollection. I can't remember the street address or anything like that.

Q Did it have a phone number on it?

A I believe, yes, sir. Yes, it did.

Q Did you search Irene Mueller's purse?

A No, I did not.

Q When you arrived did you notice items reportedly stolen on a desk?

A Yes, I did.

Q Did you conduct any search of Irene Mueller then?

A Yes, I did.

Q And what did you tell him?

A I told him that the man on the business card I had had witnessed a fight outside and that if there was any further questions he could give him a call.

Q You didn't write the report on that incident. Is that correct?

A That's correct.

Q If you had written the report would you have considered that name to have been important enough to go into the report?

MR. POMEROY: Objection; irrelevant.

THE COURT: Overruled.

THE WITNESS: I would think so, yes.

Q BY MR. OLSON: Did you have a conversation with Carol Manstrom upon arrival?

A Yes, I did.

Q And did she explain her side of the story to you?

A Briefly, yes.

Q Did you have a conversation with Irene Mueller?

A Not that I recall, no, sir.

Q Did your conversation with Carol Manstrom take place inside the security office or outside?

A Usually when I respond to take the report I ask the security officer to step outside and tell me what had occurred, so I would imagine that's what I did.

Q Do you recall who else was in the room when you arrived, in the security room?

responded back with a copy of it.

Q Did you make any charges?

A No, I didn't.

MR. OLSON: Nothing further, your Honor.

THE COURT: Mr. Pomeroy:

FURTHER REDIRECT EXAMINATION

BY MR. POMEROY:

Q Have numerous people told you that this gentleman may have been a witness to what happened outside?

A To the outside occurrence?

Q Yes.

A Yes.

Q Do you think that you might be assuming that he told you that he had witnessed something, just because so many people had told you that he might have?

MR. OLSON: Objection; calls for speculation.

THE COURT: Overruled.

THE WITNESS: As I think of the situation now as I sit up here on the stand, I feel comfortable with testifying that yes, he did say something about seeing a fight outside.

MR. POMEROY: Thank you. Nothing further.

FURTHER RECROSS-EXAMINATION

BY MR. OLSON:

Q You have testified you don't remember the entire conversation. Is that correct?

A Yes, sir.

Q Then he may have also witnessed other items?

THE COURT: He may have told you that he witnessed other items.

Q BY MR. OLSON: He may have told you that he witnessed other things?

A He may have.

MR. OLSON: Nothing further.

THE COURT: Mr. Pomeroy?

MR. POMEROY: Nothing further.

THE COURT: May the witness be excused?

MR. POMEROY: Yes.

THE COURT: You are excused. Call your next witness.

MR. POMEROY: I don't know whether he is here right now, your Honor.

THE COURT: Let's take a recess anyway. Ten-minute recess. Remember the admonition, don't discuss the facts, see you back in ten minute, keep an open mind.

(Recess, reconvening in open court at 10:52 a.m.)

THE COURT: People versus Mueller.

MR. POMEROY: I will check and see if my witness is present, your Honor.

Your Honor, my witness apparently left from his home about a half-hour ago and said it would only take 15 minutes. I don't know if he has had car trouble or

what. Here he is.

Call Officer Staton to the stand.

....

TRIAL TESTIMONY OF DR. PENNOCK

A I graduated Phi Beta Kappa from UCLA with a bachelor's degree. Attended UCLA Medical School. General internship, residency at UCLA three years. Thirteen years of education, and I was on the full-time teaching faculty of UCLA.

Q And as to your psychiatric background?

A I have a three-year residence at the Neuropsychiatric Institute, was the head physician, Harbor UCLA Inpatient Service.

Q And is Irene Mueller a patient of yours?

A Yes.

Q Did you see Irene Mueller on the date 26 January 1979?

A Yes, I did.

Q What was the occasion you saw her for?

A I saw Mrs. Mueller on January 26th because she was having physical and

emotional problems.

Q And who brought her to your office, if you know?

A She drove to my office.

Q Was she by herself?

A Yes.

Q And did she indicate any injuries to you at that time?

A Yes, she did.

Q And did you make a diagnosis of the injuries?

A Yes. I listed the injuries and made a diagnosis.

Q Did you write down on that day your diagnosis?

A Yes, I did.

Q Do you have it front of you now?

A Yes, I do.

Q What's the date on that document?

A January 26, 1979.

Q And does it have a reference title?

A I am sorry, I don't understand the questions.

Q Does it refer to any specific patient?

A Refers to Irene Mueller.

Q And could you describe, referring to your report where necessary, what was your diagnosis of her injuries on that day?

MR. POMEROY: Objection. Irrelevant, your Honor. The testimony by the prosecution witnesses were that she had no visible injuries.

THE COURT: Overruled.

THE WITNESS: She had a list of injuries which I can explain in lay terms.

Q BY MR. OLSON: That's fine.

A She had a two-inch bump on the right side of her head, right parietal area of her head. She had a two-inch abrasion or scrape of the left pretibial, the left front part of the lower leg. She

had a three-inch contusion, a bruise, over the left subpatellar or just under the kneecap of her left leg.

She had a four-inch linear contusion, just a small contusion, small bruise, over the right frontal part, anterior part of the right lower leg, front part.

She had a right sprained ankle. Those were the physical findings at that time.

....

APPENDIX B

PETITION OF WRIT OF
HABEAS CORPUS BY A
PERSON IN STATE CUSTODY

James L. Vitek Attorney at Law

1440 N. Harbor Blvd. 800

Fullerton, Ca. 92635

ADDRESS OF PLACE OF CONFINEMENT and
PRISON NUMBER

NOTE: It is your responsibility to
notify the Clerk of Court in
writing of any change of
address

NOTE: If represented by an attorney, his
name, address, telephone number.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Irene D. Mueller

Full name (include name under which
you were convicted)

Irene D. Mueller
Petitioner,

vs.

Superior Court of California,
County of Orange (California, Real Party in Interests)

Name of warden, Superintendent,
Jailer, or authorized person
having custody of petitioner

Respondent.

and

ATTORNEY GENERAL OF THE STATE OF California

ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be
served in the future, petitioner must file in the name of the state where
the judgment was entered. If petitioner has a sentence to be served in the
future under a federal judgment which he wishes to attack, he should file a
motion under 28 U.S.C. 1255, in the federal court which entered the judgment.)

INSTRUCTIONS - READ CAREFULLY

This petition shall be legibly handwritten or typewritten, signed by the
petitioner, under penalty of perjury. You must set forth concisely the

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

CV - 59, * /73)

Page 1 of 12

answer to each question in the proper space on the form. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.

You must not attach separate pages to this petition, except that ONE separate additional page is permitted in answering Question No. 15.

Upon receipt of a fee of \$5.00 your petition will be filed if it is in proper order.

If you are seeking leave to proceed in forma pauperis (without paying the \$5.00 filing fee and other court costs), then you must also execute the declaration on the last page, setting forth information which establishes your inability to pay the fees and costs of the proceedings or to give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds \$25.00, you must pay the filing fee as required by the rule of the district court.

When the petition is completed, the original and two copies must be mailed to the Clerk of the United States District Court for the Central District of California, United States Courthouse, 114 North Spring Street, Los Angeles, California 90012, ATTN: Intake/Docket Section.

Only one sentence, conviction or parole matter may be challenged in a single petition. If you challenge more than one, you must do so by separate petitions.

Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PLEASE COMPLETE THE FOLLOWING: (check appropriate number)

This petition concerns:

1. X a conviction.
2. a sentence.
3. jail or prison conditions.
4. prison discipline.
5. a parole problem
6. other

DEFENDANT

1. Place of detention informal probation
2. Conviction on which the petition is based (a separate petition must be filed for each conviction being attacked).
 - a. Nature of offense involved (include all counts) Petty Theft, Assault & Battery
 - b. Penal or other code section or sections (184-488) 240, 242
 - c. Name and location of sentencing court Municipal Court, Central Judicial District, County of Orange.
 - d. Case Number Muni. Ct. No. 79CM00607
 - e. Date of conviction November 10, 1981
 - f. Date of Sentence November 10, 1981
 - g. Length of sentence on each count Three years informal probation for all three counts.
 - h. Plea (check one)
(1) Not guilty (x) (2) Guilty () (3) Nolo Contendere ()
 - i. Kind of trial (check one).
(1) Jury (x) (2) Judge alone () (3) Judge alone on transcript ()
 - j. Did you testify at the trial? Yes (x) No ()
3. Did you appeal from the conviction or sentence? Yes (x) No ()
4. If you did appeal, give the following information for each appeal.
 - a. (1) Name of Court Superior Court of Orange County Appellate Div.
 - (2) Result Denied
 - (3) Date of result July 20, 1981
 - (4) Citation or number of opinion Case No. AP-3258

(3) Grounds raised (list each)

- (a) The evidence that was suppressed (ie. a business card by police) was material as to guilt or innocence.
- (b) _____
- (c) The suppression or destruction of the business card denied Petitioner a fair trial on the grounds of
- (d) _____
- (e) Due Process under the Fourteenth amendment.
- (f) The suppression of substantial material evidence bearing
- (g) on the credibility of a key defense witness is a denial

b. (1) Name of court: Court of Appeal-State of California-Fourth District

(2) Result: Denied

(3) Date of result: August 24, 1981

(4) Citation or number of opinion: 1 Civil 2717

(5) Grounds raised (list each) Raised the same grounds as described above.

- (a) _____
- (b) _____
- (c) _____
- (d) _____
- (e) _____
- (f) _____
- (g) _____

3. If you did not appeal:

a. State your reasons _____

b. Did you seek permission to file a late appeal? ☒ Yes ☐ No (X)

6. Other than a direct appeal, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes (x) No ()

7. If your answer to 6 was YES give the following information.

- a. (1) Name of court State Supreme Court of California
(2) Nature of proceeding Writ of Mandate and/or Prohibition.
(3) Grounds raised Petitioner was denied her due process rights under the Fourteenth amendment by reason of the fact that Police officers acting under color of title intentionally suppressed a material piece of evidence. Therefore, Petitioner
(4) Result was denied a fair trial and the right to present a material witness on her behalf.
(5) Date of result October 7, 1981
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition
Case No. 27171

- b. (1) Name of court Supreme Court of the United States
(2) Nature of proceeding Writ of Certiorari
(3) Grounds raised Petitioner was denied due process of law under the Fourteenth amendment when an investing policeman, acting as a state representative, willfully suppressed a business card containing the name and address of a material witness for the defense
(4) Result Denied
(5) Date of result April 4, 1982
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition.
Case No. 81-1354

- c. (1) Name of court _____
 (2) Nature of proceeding _____
 (3) Grounds raised _____

 (4) Result _____
 (5) Date of result _____
 (6) Citation or number of any written opinions or orders entered pursuant to each such disposition.

8. Was an evidentiary hearing held? Yes () No (x).

If so, state the name of the court, and the result _____

9. If your answer to 8 was NO, explain briefly why you did not seek post-conviction relief in the state courts.

Petitioner's direct appeal was denied; Petitioner's extraordinary writs were also denied without an evidentiary hearing.

CAUTION: Exhaustion Requirement: In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted as to some grounds, you must first present all other grounds to the state court.

10. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, attach a SINGLE page only behind this page.

CAUTION: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

1. Ground one Petitioner was denied a fair trial because material evidence (i.e. a business card containing the name of a main witness) was lost by the police; (tell your story BRIEFLY without citing cases or law).

CAUTION: You must state facts not conclusions in support of your grounds. (e.g., if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do). A rule of thumb to follow is - who did exactly what to violate your rights at what time or place.

The evidence is material because the witness observed the petitioner place the money on the counter in regards to the petty theft charge, and observed the security guard accost petitioner first, in regards to the assault and battery charges. The witness comforted petitioner; gave his business card containing his name and address to the police officer (who at trial admitted that fact). Witness was willing to testify by reason of the fact that he gave his card to the police officer.

2. Ground Two Petitioner was denied a fair trial because the police officer intentionally suppressed the material evidence (business card supporting FACTS (tell your story BRIEFLY without citing cases or law).

The first police officer to arrive was given the business card. Thereafter, the police officer gave it to another officer who arrived later, that officer has no recollection of ever receiving it. It is well known that all three of the investigating officers knew the security guard, and that one of the investigating officers was her boyfriend (who admitted that fact at trial).

- The first officer distinctly remembers seeing the material witness outside of the security room. He remembers talking to the material witness concerning the incident. The other officers, including the officer who was the boyfriend of the security guard has no recollection of the material witness at all.
3. Ground Three

The suppression or destruction of the business card deprived petitioner of her fundamental constitutional right of a fair trial.
Supporting FACTS (tell your story WITHOUT citing cases or law):
under the Due process clause of the Fourteenth amendment.

- The witness observed the entire incident relating to petitioner's alleged criminal acts: Petty theft, and assault and battery charges.
The witness consoled petitioner and told her she had nothing to worry about. Consequently, witness was material as to petitioner's defense to prove her innocence. By losing the business card, the police officers denied petitioner her right to present favorable evidence on her behalf.

4. Ground Four

Supporting FACTS (tell your story WITHOUT citing cases or law):

11. If any of the grounds listed in 10 were not previously presented to this court or any other court, state briefly which grounds were not so presented and give your reasons.
None.

12. Do you have any petition, appeal or parole matter pending in any court, either state or federal as to the judgment of conviction under attack?

Yes () No (X)

13. Are you presently represented by counsel? Yes (X) No ()

If so, name, address and telephone number James L. Vitek
1440 N. Harbor Blvd. Fullerton, Ca. 92635. (714)680-4451

Case name and court _____

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Signed this 23 day of May, 19 82.

Irene D. Mueller
(Signature of Petitioner)
Irene D. Mueller

DECLARATION

- Irene D. Mueller, declare under penalty of perjury
that I have read and subscribe to the above and state that the information
contained therein is true and correct to the best of my knowledge.

Executed on May 23, 1982 at Fullerton, Ca.
(Date) (Place)

Irene D. Mueller
(Signature of Petitioner,
Irene D. Mueller)

James L. Vitek
(Signature of Attorney for and by,
James L. Vitek)

APPENDIX C

ORDER TO SHOW CAUSE

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,	)	NO. CV 82-2598-CBM(K)
)	
Petitioner,	)	ORDER TO SHOW CAUSE
)	
vs.)	
	)	DATE FILED:
SUPERIOR COURT OF)	
CALIFORNIA, COUNTY	)	May 28, 1982
OF ORANGE,)	
)	
Respondent.)	
)	

Based upon the petition filed herein
and good cause appearing:

IT IS HEREBY ORDERED that respondent
or his counsel file a return with this
Court within 23 days of the date of this
Order, to show cause, if any there be, why
a writ of habeas corpus should not be
issued herein.

IT IS FURTHER ORDERED that the Clerk
of this Court forthwith serve a copy of
this Order upon respondent by serving a
copy of the petition and of this Order
upon the Attorney General of the State of

California, official counsel for respondent, as well as upon petitioner, and that respondent or his counsel serve a copy of the return upon petitioner prior to the filing thereof.

DATED: This 28th day of May, 1982.

JOHN R. KRONENBERG
United States Magistrate

APPENDIX D

**PETITIONER'S OBJECTIONS AND
POINTS AND AUTHORITIES**

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,)	
)	
Petitioner,	)	NO. CV 82-2598 CBM(K)
)	
vs.)	
	)	PETITIONER'S
SUPERIOR COURT OF	)	OBJECTIONS AND
CALIFORNIA, COUNTY	)	POINTS AND
OF ORANGE,	)	AUTHORITIES
)	
Respondent,	)	DATE FILED:
)	
PEOPLE OF THE	)	October 29, 1982
STATE OF)	
CALIFORNIA,)	
)	
Real Party in)	
Interest.)	
)	

THE STATE COURT'S FINDING THAT
PETITIONER HAD AMPLE OPPORTUNITY
TO DISCOVER THE MYSTERIOUS WITNESS'
NAME AND ADDRESS WAS IN ERROR

Petitioner respectfully objects to
the finding in the report that petitioner
had ample opportunity to discover the
witness' name and address. Petitioner
testified under oath at her trial that she

had received a severe chop to the neck, that she had received a severe kick in the stomach, that she was bleeding internally and that she had blood in her mouth. (Petitioner's testimony is attached as Exhibit 1.)

After the incident, petitioner went immediately to her doctor, who confirmed the above injuries at her trial. (The doctor's testimony was attached to Petitioner's Traverse.)

Consequently, petitioner was not in a normal state of mind when she was in the interrogation room with the mysterious witness. Petitioner should not be held to what a normal person would do under the same circumstances. Petitioner was severely injured by the assault and battery and therefore was not in a state of mind to become an inquisitor.

Petitioner respectfully objects to the State Court's finding that a

conversation between her and the mysterious witness lasted twenty minutes. There is no credible evidence in existence that shows the petitioner and the mysterious witness had a twenty-minute conversation; petitioner has never testified at any time to that fact. Moreover, Carol Manstrom, the security guard who was present in the interrogation room with petitioner and the witness, testified under oath at the trial that the conversation was "maybe 10 minutes or so." She goes on to state that the conversation was sporadic, and that she was also having a conversation with petitioner at the same time. (Carol Manstrom's testimony attached as Exhibit 2.)

The security guard was trying to solicit, from petitioner, information concerning petitioner's name, address and phone number. Consequently, petitioner had no opportunity to do likewise with the

mysterious witness. It was Carol Manstrom, the security guard, not petitioner, who was conducting the conversation within the interrogation room.

Petitioner objects to the finding in the report that the business card loss was unintentional - the issue is that the business card, containing the name, address and phone number of a material witness was lost by the Orange City Police. Whether it was intentional or unintentional is not relevant. People v. Swearingen, 84 Cal.App.3d, 570, states at page 574:

"The Attorney General argues that Hitch is applicable only when there has been an intentional destruction of evidence by the police and not negligent loss of evidence. The argument fails ... (T)he Hitch rule exists to guarantee a defendant a fair trial through the preservation of evidence and not to punish police conduct. A fair trial is no less denied by negligent loss of evidence than it is by nonmalicious destruction." (Emphasis added.)

The relevant issue concerning the loss of the business card is this: whether petitioner has been denied her due process right to present favorable testimony on her behalf. Washington v. Texas, 388 US 14-

PETITIONER HAS SHOWN THAT THE
MYSTERIOUS WITNESS WOULD TESTIFY
FAVORABLY ON HER BEHALF

Petitioner respectfully objects to the finding of the report which states that no showing of favorableness on the part of the mysterious witness has been shown.

In United States v. Valenzuela-Bernal, 647 F.2d 72, 75, the Court listed the two elements that must be shown before a defendant's due process rights are denied by the absence of a material witness.

Those elements are:

(1) Unilateral Government action denying a defendant access to a witness; and

(2) Prejudice, i.e., loss of a conceivable benefit to the defendant from the missing witness' testimony. United States v. Valenzuela-Bernal, 647 F.2d, 72, 75.

The Court defined "conceivable benefit" regarding the witness' testimony as: eye witnesses to, and active participants in, the crime charged, so that there was a strong possibility that they could have provided material and relevant evidence concerning the events constituting the crime. U.S. V-B (Supro) 74.

In the case at bar, petitioner has shown that a witness left his business card containing his name, address and phone number with investigating officers and that the business card was lost or

misplaced by the police officer. (The police officer's trial testimony was attached to Petitioner's Traverse.) Police officer's testimony clearly showed that the witness gave his business card to the officer. Consequently, the police officer, by misplacing the business card, whether done intentionally or unintentionally, has satisfied the element of a unilateral Government action denying a defendant access to a witness. United States v. Mendez-Rodriguez, 450 F.2d 1, 5.

Concerning the second element that a defendant must receive a conceivable benefit from the absence of witness testimony, petitioner can distinctly show that the material witness observed the entire incident and not just the assault and battery as was stated in the State Court's finding.

Petitioner can show that Officer Kenny, the only police officer to have a

conversation with the witness, testified under oath that the witness said he observed a fight between petitioner and the security guard. On further cross-examination, Officer Kenny stated the witness may have told him that he, the witness, observed other things. (Police Officer Kenny's testimony attached as Exhibit 3.)

Therefore, the police officer is saying that the witness did, in fact, observe other things - these "other things" meaning the petitioner placing the money on the counter. Since the business card of the witness has been lost, petitioner has been denied her due process right to ascertain the witness' testimony concerning the content of the conversation with Officer Kenny.

Petitioner testified at her trial that the witness clearly told her that he observed the placing of twenty dollars

(\$20.00) on the counter. Petitioner states:

"He not only said that he was beside me when I had put the \$20 -- when I had put the money down on the counter; he also said that he had saw Carol Manstrom, this woman, attack me out in the lot. He stated this fact."

Petitioner goes on to state:

"He said that he saw the entire thing, that I needn't be afraid, and he had ahold of my hand. I had ahold of his hand walking into Penny's interrogation room."

Therefore, petitioner has shown that the witness saw the entire event; thereby satisfying the second element in Mendez-Rodriguez. Consequently, petitioner has shown that the witness' testimony could have a strong possibility of providing material and relevant evidence concerning the events constituting the crime.

As stated in In Re Oliver, 333 US 257, the petitioner has a Constitutional right to present testimony on her behalf:

"The right to offer the testimony of

witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In conclusion, petitioner has been denied the right to obtain a witness in her favor; a witness who would have testified to her innocence of the charges of which she was convicted.

As the Court in Washington v. Texas, 388, US 14, 98 succinctly stated:

"We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed and whose testimony would have been relevant and material to the defense.

Accordingly, the petitioner respectfully urges that this Honorable Court order a Writ of Habeas Corpus.

Respectfully submitted.

James Vitek
Attorney for Petitioner

PETITIONER IRENE MUELLER - TRIAL TESTIMONY

EXHIBIT I

EXHIBIT I

to Mr. X departing, with Mr. X?

A No. Mr. X asked to call his place of employment to say that he would be late, and he asked to use the phone, and that's all he said to her.

Q And did he use the phone in your presence?

A Yes, he did.

Q Did he make a complete call? In other words, did someone answer?

A Yes.

Q And he had a conversation on the phone?

A Yes, he did.

Q Now, did you have a conversation with Mr. X?

A Yes, I did.

Q And can you now tell us what the substance of that conversation was?

A He not only said that he was

beside me when I had put the \$20 -- when I had put the money down on the counter; he also said that he had saw Carol Manstrom, this woman, attack me out in the lot. He stated this fact.

He also said that he had been a teacher in Pasadena, and I had been there many years before but I didn't know him.

Q And then Mr. Chatterton ordered him to leave?

A That's right.

Q And he complied.

A He wanted no more information.

Q And were there any officers present at the time he departed?

....

Q What type of billfold was it? Was it one like mine, that you unfold and then open it up like this to get your money out (indicating)?

A It unfolds. It's unfolded, sir. You just --

Q Like this (indicating)?

A No, you just pull the money out.

Q Like -- you just pull it out of your purse like this and pull the money out (indicating)?

A That's right, sir.

Q Then you went to the south cosmetic counter still holding the \$20, right?

A That's right, sir.

Q Mary Jane Ramstead was dusting racks?

A That's right, sir.

Q Which rack was she dusting?

A I have no idea. She was paying no attention. She was just dusting racks,

as she called them -- gondolas, or whatever they were.

Q What was the gentleman who was there in the south cosmetic area doing at that time?

A He was walking around the store like other customers in the store.

Q Was he making any purchase at the south cosmetic counter?

A No, but he was right beside me.

Q Was he just standing beside you at that time?

A He was walking right beside me as I put the money down.

Q In which direction was he walking? Would you indicate on the diagram, with the Court's permission?

A I was aware of him about here (indicating).

Q When you were there?

A That's right.

Q Would you turn a little bit and

point toward that so the jury can see what you are pointing at? You were about there when you became aware of him?

A I was walking toward the counter there, sir.

Q In which direction was he walking?

A The same way, sir.

Q The same direction you were?

A That's right, sir.

Q Was he walking quickly or slowly?

A He was walking about the same rate that I was sir.

Q And was he walking just to your right shoulder here?

A He was walking -- let's see. He would be walking to my right.

Q And did he appear to be looking at anything?

A He seemed to be just following me, sir.

Q He was following you?

A I don't know. He was right beside me. Then when I came around the escalator --

Q Did he continue to walk beside you as you came around the escalator?

A He was behind me, and the next time I became aware of him was when he broke up the fight outside.

Q When he was walking beside you as you passed the south cosmetic counter, didn't -- didn't you stop at the south cosmetic counter at all?

A I stopped only long enough to put the \$20 down by the cash register, sir.

Q Did you stop when Mary Jane Ramstead said, "You can purchase that here"?

A She made no attempt to get up from her dusting and her stooping down. She made no attempt to come up to the

counter, so all I did was place the money on the counter.

Q Did she say, "You can purchase that here," or did she say, "You have to purchase that here"?

A I don't remember her exact words.

Q Did she say that before you put the \$20 bill down or afterwards?

A Before.

Q And right after that you put the \$20 bill down?

A That's right.

Q Did you say anything to her, did you say, "Oh, I guess I'll just put a \$20 bill down here, don't worry about it"?

A I said, "I do not need a bag. I am in a hurry."

Q So she was then over dusting, right?

A That's right.

Q And did she have a bottle of windex in one hand,

A Oh, no, it was later.

Q What happened right after she had hold of your hair and pulled your head back and was choking you from behind?

A I grabbed ahold of her hair.

Q How did you do that? Did you spin around?

A By that I mean she had me -- she had my arm, she had my purse, and of course I was facing her at that time, so of course I grabbed her hair back. That was the only way of protecting that I knew.

Q Is that when she let go of your scarf?

A I imagine so, sir.

Q Did you stop choking at that time?

A Yes, sir.

Q So after she snapped your head back and she choked you, you turned around and then the very next thing that happened

was you grabbed ahold of her hair?

A I believe so, sir.

Q And that's when she let go of your scarf, right?

A I can't remember exactly, sir, because she was doing so many things so fast to me I cannot really remember.

Q Was she, in your opinion, an expert in martial arts?

A I would say so, sir.

Q Did she ever scream out "Ayee" or anything like that?

A Oh, no, she just used -- just like you did, though, with her knee into my groin.

Q Was that before or after the judo chop to your neck?

A After.

Q So how did she reach behind you to give you a -- by judo chop, do you mean a blow to the back of your neck with the outside of her palm?

A I imagine so, sir.

Q Now, did she move behind you suddenly to do that?

A I don't know where she was, sir. All I know is that she did it.

Q Did she grab your shoulders and pull your body in toward her and then knee you in the stomach?

A When she -- all I know is that she had ahold of my clothing, she had ahold of my body, she had ahold of me, and she used her knee to my stomach and she tripped me to the ground, sir.

Q And then sometime during there somewhere she gave you a judo chop to the back of the neck?

A That's right, sir.

Q Did you lose consciousness at that time?

A No, sir.

Q Was it right after she knee'd you in the stomach that she tripped you to

the ground?

A Yes, shortly after, yes.

Q When you were on the ground did she continue to kick you?

A Yes, she did.

Q Where did she kick you? In the head?

A No. She kicked me along my legs.

Q And were you just lying on the ground? Did you

....

A No, she continuously kicked the chair throughout the deposition, although she was told to refrain from doing so. She called me names. She harassed me during the whole time and she knew the condition I was in at the time, but this made no difference to Miss Manstrom.

Q I couldn't help noticing that you were smiling during the entire time she was testifying. Were you enjoying watching her being cross-examined?

A I was not smiling, sir.

THE COURT: Looked to me like she was sleeping.

Q BY MR. POMEROY: By the way, while you were in the security office, were you swallowing blood?

A There was blood in my mouth. Internally somehow there was blood in my mouth and it was all over the inside of my mouth and I was swallowing blood, yes, sir, I was.

Q Did you report that to Dr. Penock the next day?

A No. There were so many other things and I was so distraught that I didn't mention all the things. He made the examination. He made the findings and he wrote them down.

Q You thought it was more important to point out the bump on your head and the black and blue marks --

A He made the examination, sir.

Q You didn't point out anything to him?

A I was hardly able to talk, sir.

Q Did you point out any of your injuries to him?

A He made a full examination of my whole body and he saw the injuries, sir.

Q Did you point out any of your injuries to him?

....

MR. OLSON: Mrs. Mueller, if I can extract from you in narrative fashion what essentially was the conversation between yourself and the mystery witness in the detection room that he would probably testify to if he were there --

THE DEFENDANT: The mystery witness was beside me when I put the \$20 beside the cash register. The mystery witness followed me outside. The mystery witness saw the assault, stopped the assault of Manstrom upon me. I asked the mystery witness to come in with me to be my one and only witness, and he assented and he came in and he sat there, and Manstrom took his address, telephone number, the place where he worked, but it did not appear in the final statement.

MR. OLSON: Well, was he told to leave by anyone?

THE DEFENDANT: Mr. Chatterton told him to leave.

MR. OLSON: And did he then leave?

THE DEFENDANT: Yes.

MR. OLSON: Did he leave his business card with anyone?

THE DEFENDANT: He left before any police officer arrived. He gave his card to the first officer, which was Officer Staton, and Officer Staton -- rather, Officer -- let's see. The first one, Kenney, said that he received the card from him, and this is his testimony.

MR. OLSON: In other words, they met as the officers were arriving?

THE DEFENDANT: That's right, and he decided he had better give it to an officer, so he gave it to him, and according to Officer Kenney he received a card from this witness.

THE COURT: Mr. Pomeroy, do you have any questions you would like to ask Mrs. Mueller?

MR. POMEROY (DA): Yes. Mrs.

Mueller, did this mystery witness make any state- ments with regard to what he had seen?

THE DEFENDANT: Yes. He told me he saw the entire thing.

MR. POMEROY: Did he say what he had seen happen?

THE DEFENDANT: Yes. He saw -- he said that he saw me put the money down by the cash register, he also said he saw the attack of Manstrom upon me outside, and when I asked him to come in he came into the interrogation room.

MR. POMEROY: Do you remember what he said with regard to what he saw of the attack?

THE DEFENDANT: Yes. First of all, that she took ahold of my arm, took ahold of my purse, she gave me a judo chop into the stomach, she tripped me, I fell to the sidewalk. He saw the entire thing.

MR. POMEROY: Did he say that he had

seen each one of those things?

THE DEFENDANT: He said that he saw the entire thing, that I needn't be afraid, and he had ahold of my hand. I had ahold of his hand walking into Penney's interrogation room.

MR. POMEROY: Did he say that he had seen Mrs. Manstrom punch you?

THE DEFENDANT: He said that he saw Miss Manstrom's knee enter my stomach, he saw me fall to the floor, Miss Manstrom had tripped me. I fell to the sidewalk. I had a sprained ankle. He saw all of these things.

MR. POMEROY: I am not asking you what you think that he saw. I am asking you what he said that he had seen.

THE DEFENDANT: He said that, he said he saw the entire thing, and when I asked him to come in with me he said he certainly would.

THE COURT: Well, you are not

specifically answering what the blows were. There was a blow to the stomach with the knee?

THE DEFENDANT: Yes.

THE COURT: Then you indicated that as a result of the

CAROL MANSTROM, SECURITY GUARD - TESTIMONY

EXHIBIT II

A She did not want to come back to the store. She continued to protest coming back in the store. She claimed that I had been brutal with her or something like that and she didn't want to come back in the store, and they just kept continuing to say, well, you know, "Go back in the store and let the police take care of it."

Q And then did she eventually go back into the store?

A Yes, she did.

Q Did you go back with her back into the store?

A Yes.

Q Where did you go?

A We went into the security office.

Q And once you arrived in the security office what happened?

A Well, we sat down and I started asking her the general questions that we

always asked, name, address, that sort of thing, for our report, and I started typing my report.

Q Did you run your hand through your hair in the security office?

A Yes.

Q And did anything unusual happen?

A Yes.

Q What was that?

A Small handful of hair fell out from the part where she had pulled it.

Q Did you save that hair?

A Yes.

...

Q Was Mr. X ever left alone in the room with Mrs. Mueller?

A No.

Q Was Mrs. Mueller left in the room alone with anyone else?

A Not to my knowledge.

Q Did you hear the entire conversation between Mrs. Mueller and Mr. X?

A I was there the whole time, yes.

Q And did Mr. X ever indicate that he had seen the incident?

A No, he didn't. I mean other than just seeing when he walked up to us. That's the only thing he indicated. I might add that she also told him that I had brutally attacked her outside the store.

Q Was there anything else that they discussed?

A She told him something to the effect that she was a schoolteacher, and

he made some comment to the effect that he was involved somehow with counseling or something in a medical teaching or counseling capacity of some sort.

Q How long did the conversation last?

A Oh, he was there for maybe 10 minutes or so, but they weren't conversing the whole time. It was sporadic.

Q Were you paying close attention to their conversation?

A I was right there. I could hear what they were saying.

Q What were you doing at the time?

A I was typing my report.

Q Typing your report and simultaneously listening?

A Yes.

Q How many words a minute do you type?

A Oh, not too many. Maybe 30.

Q So you have to concentrate to

type?

A I'd say I have to concentrate a little bit to type.

Q Were you transferring handwritten notes into typewritten notes?

A No.

Q You were typing from your head?

A Yes.

Q And simultaneously listening to every word of the conversation?

A Well, you have got to understand that I wasn't just typing continuously, you know. I would stop, Mrs. Mueller and I were having a conversation too. My report wasn't just typed out all at one time.

Q Did you ever ask Mrs. Mueller for an explanation?

A An explanation? As to why she had taken the items?

Q As to what had happened, as to her story.

A Yes, I did.

Q Did she reply anything?

A At first, like I said, she
refused to say

...

POLICE OFFICER KENNEY - TESTIMONY

EXHIBIT III

responded back with a copy of it.

Q Did you make any changes?

A No, I didn't.

MR. OLSON: Nothing further, your Honor.

THE COURT: Mr. Pomeroy?

FURTHER REDIRECT EXAMINATION

BY MR. POMEROY:

Q Have numerous people told you that this gentleman may have been a witness to what happened outside?

A To the outside occurrence?

Q Yes.

A Yes.

Q Do you think that you might be assuming that he told you that he had witnessed something, just because so many people had told you that he might have?

MR. OLSON: Objection; calls for speculation.

THE COURT: Overruled.

THE WITNESS: As I think of the situation now as I sit up here on the stand, I feel comfortable with testifying that yes, he did say something about seeing a fight outside.

MR. POMEROY: Thank you. Nothing further.

FURTHER RECROSS-EXAMINATION

BY MR. OLSON:

Q You have testified you don't remember the entire conversation. Is that correct?

A Yes, sir.

Q Then he may have also witnessed other items?

THE COURT: He may have told you that he witnessed other items.

Q BY MR. OLSON: He may have told you that he witnessed other things?

A He may have.

MR. OLSON: Nothing further.

THE COURT: Mr. Pomeroy?

MR. POMEROY: Nothing further.

THE COURT: May the witness be excused?

MR. POMEROY: Yes.

THE COURT: You are excused. Call your next witness.

MR. POMEROY: I don't know whether he is here right now, your Honor.

THE COURT: Let's take a recess anyway. Ten-minute recess. Remember the admonition, don't discuss the facts, see you back in ten minutes, keep an open mind.

(Recess, reconvening in open court at 10:52 a.m.)

THE COURT: People versus Mueller.

MR. POMEROY: I will check and see if my witness is present, your Honor.

Your Honor, my witness apparently left from his home about a half-hour ago and said it would only take

15 minutes. I don't know if he has had car trouble or what. Here he is.

Call Officer Staton to the stand.

....

APPENDIX E

**RETURN TO PETITION FOR
WRIT OF HABEAS CORPUS**

EXHIBIT E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,)	
)	
Petitioner,	)	NO. CV 82-2598 CBM(K)
)	
vs.	)	RETURN TO PETITION
	)	FOR WRIT OF
SUPERIOR COURT OF	)	HABEAS CORPUS
CALIFORNIA, COUNTY)	
OF ORANGE,)	
)	
Respondent.)	
)	
PEOPLE OF THE)	
STATE OF)	
CALIFORNIA,)	
)	
Real Party in)	
Interest.)	
)	

TO THE HONORABLE UNITED STATES
DISTRICT COURT OF THE CENTRAL
DISTRICT OF CALIFORNIA

COMES NOW THE REAL PARTY IN INTEREST,
The People of the State of California, who
by their attorney, Cecil Hicks, District
Attorney for the County of Orange, allege
by way of Return to Writ of Habeas Corpus
as follows:

1. Admit those allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 11, 12, and 13.

2. Deny those allegations in paragraphs 8 and 10, and affirmatively allege that:

3. Petitioner is lawfully and properly in constructive custody.

4. An evidentiary hearing to litigate the alleged violations of Petitioner's rights was held on January 28, 1980.

5. The municipal court properly denied Petitioner's motion to dismiss the complaint charging her with petty theft and assault and battery inasmuch as Petitioner's rights were not violated by the failure of law enforcement to ascertain the identity of an unknown person at the scene of the crime.

6. The municipal court, the Honorable Tam Nomoto (then Barbara Tam

Thompson) presiding, made an Order Denying Motion to Dismiss. That Order was attached to the Engrossed Statement on Appeal for the purpose of the Superior Court appeal.

7. Judge Nomoto's findings are summarized as follows:

a. The missing witness was material to the assault and battery charges;

b. The People are not held responsible for the absence of the witness inasmuch as:

(1) Petitioner had twenty minutes in which to acquire the witness' identity through her own efforts,

(2) Petitioner is not excused from responsibility for safeguarding her interests nor are the police obligated to serve as her investigators on the basis of her mistaken belief that the officers will so act,

(3) Credible evidence showed that Petitioner was fully capable at the relevant time of ascertaining the witness' identity herself.

(4) Credible evidence showed that the loss of the witness' business card was unintentional and that the card itself had so little information as to be valueless.

8. The Points and Authorities submitted with this Return to the Petition have a certified copy of the above Order Denying Motion to Dismiss attached thereto. Each is incorporated herein by this reference as though set forth in full.

WHEREFORE, Respondent and Real Party in Interest pray that this Honorable Court deny Petitioner the relief which he seeks.

I declare under penalty of perjury that I have read and subscribe to the above and state that the information

contained therein is true and correct to
the best of my knowledge.

Signed this 18th day of June, 1982 at
Santa Ana, California.

Respectfully submitted,

CECIL HICKS, DISTRICT ATTORNEY
of the COUNTY OF ORANGE,
STATE OF CALIFORNIA

MICHAEL R. CAPIZZI, ASSISTANT
DISTRICT ATTORNEY in Charge of
Special Operations

WILLIAM W. BEDSWORTH, DEPUTY
DISTRICT ATTORNEY HEAD OF
COURT, WRITS & APPEALS
SECTION

NINA R. BRICE, DEPUTY
DISTRICT ATTORNEY

Attorneys for Respondent and
Real Party in Interest

APPENDIX F

**PETITIONER'S OBJECTIONS AND
POINTS AND AUTHORITIES**

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,)	
)	
Petitioner,	)	NO. CV 82-2598 CBM(K)
)	
vs.)	
	)	POINTS AND
SUPERIOR COURT OF	)	AUTHORITIES IN SUPPORT
CALIFORNIA, COUNTY	)	OF RETURN TO PETITION
OF ORANGE,	)	FOR HABEAS CORPUS
)	
Respondent,)	
	)	DATE FILED:
PEOPLE OF THE)	
STATE OF	)	October 29, 1982
CALIFORNIA,)	
)	
Real Party in)	
Interest.)	
)	

NEITHER THE PETITION NOR THE
RECORD SHOWS ANY VIOLATION OF
PETITIONER'S RIGHTS

Petitioner has failed to meet her
burden of showing that the state
fact-finding process was deficient. Crow
v. Eyman, 459 F.2d 24, 25 (9th Cir.),
cert. denied, 409 U.S. 867 (1972). Her
petition does not address the sufficiency

of the evidence to support her conviction, but instead focuses on the pre-trial ruling denying her motion to dismiss and the subsequent effect on the evidence at trial.

Thus it is necessary to note specifically whether Petitioner has met her burden with regard to deficiency in that pre-trial motion. It is clear that she has not rebutted the presumption that the Municipal Court's conclusions are correct. Thus her matter is before this Honorable Court with the presumption of 28 U.S.C. §2254(d) (Supp. 1967) fully applicable. It states, in relevant part:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction ... evidenced by a ... written opinion, or other reliable and adequate written indicia, shall be presumed to be correct ...

In support of that presumption's

application, the People have attached to this brief a certified copy of the Municipal Court's Order Denying Motion and hereby incorporate it by this reference as though set forth in full. The Order makes it abundantly clear that the Judge heard evidence on the "suppression" of evidence issue in great detail. The Judge's findings and conclusions are pointedly made upon "credible evidence." That phrase appears to eliminate some of Petitioner's contentions as testified to by her at that hearing.

One basic conclusion of the Court is that there was no failure to disclose evidence, a concept which the Petitioner impliedly asserts in her Petition. This is not a case in which the government has hidden evidence which might have benefited the petitioner. U.S. v. Bowles, 488 F.2d 1307, 159 U.W. App.D.C. 407, cert. denied 94 S.Ct. 1591, 415 U.S. 991, 39 L.Ed.2d

888, Levin v. Katzenbach, 363 F.2d 287, 124 U.S. App.D.C. 158, on remand 262 F.Supp. 951. There is unquestionably a duty on the part of the prosecution to disclose substantial material evidence favorable to the accused; this duty extends to evidence relating directly to guilt, to punishment, or to the credibility of a witness. People v. Rutherford, (1975) 14 Cal.3d 399, In re Ferguson (1971) 5 Cal.3d 525.

The People acknowledge that this duty of prosecution includes their co-workers, the police. The failure of the police to disclose such evidence is a deprivation of a defendant's full rights even when the failure to disclose is negligent. Barbee v. Warden, 331 Fed.R.846, Walker v. Bishop, 235 F.Supp. 767, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217.

Petitioner fails to recognize, however, that none of these cases and principles has application to a situation such as the instant one, where there is no failure to disclose, no secret-keeping by the government. There cannot be application where the defendant and prosecution have even equal access to the information, much less the defendant-advantage situation in the instant case.

As a rule of convenience, if not common sense, the law holds that the party with the knowledge of particular information has the burden of establishing it as fact. Browzin v. Catholic University of America, 527 F.2d 843, U.S. v. Hayes, 369 F.2d 671. Respondent fully acknowledges and accepts the proposition that the People shoulder the entire burden of proof in a criminal matter and that Petitioner has no burden of proof per se.

Nevertheless, the rule cited is

offered by way of analogy. The underlying rationale of the rule requiring the exclusively or predominantly knowledgeable party to prove that knowledge is a practical and efficient one. In the instant case it was found that Petitioner herself had the benefit of a personal involvement with the mystery man for approximately twenty minutes. She was not only consoled by him but the conversation apparently involved some give and take for she learned two personal and distinguishing characteristics of the gentleman - his profession and likely place of employment.

Petitioner at all times had the superior opportunity and motivation to learn the identity of the mystery man. That she failed to acquire that information is no fault of law enforcement's. There is no evidence that the communications of the two were

thwarted, curtailed, or interrupted in any manner at any time.

This was the second basic conclusion of the Municipal Court Judge. She declined to dismiss the case for failure of the police to acquire or retain the identity of the mystery man when Petitioner had the ability, motivation, and opportunity to do so herself. Judge Nomoto relied on several California cases:

The duty of the police and the distinction between the confidential informant and noninformant witness was clearly enunciated in People v. Hernandez (1978) 84 Cal.App.13d 408, where the defendant, charged with robbery, moved to dismiss the information against him for failure of the police to maintain contact with the victim-witness of the robbery. The court rejected the defendant's position by stating at 411:

While Eleazer, Goliday, and their progeny impose a duty upon the police

and prosecution to exercise due diligence to maintain means of contact with an informant who is a material witness whose testimony might conceivably be favorable to a defendant, the duty is different in the case of a noninformant witness. There it requires only that the police or prosecution refrain from conduct which makes the noninformant material witness unavailable. [Citations omitted.] [Emphasis added.]

In People v. Flores (1976) 62 Cal. App.3d Supp.19 and In re Jesus B. (1977) 75 Cal.App.3d 444, the court was asked to enlarge upon the prosecution's duty in regard to noninformer witnesses. In both cases, the court rejected the defense arguments and refused to "impose a general duty on prosecutorial officials to serve as defense investigators". In re Jesus B. (supra) at 449 citing People v. Flores (supra) at 23. [Emphasis added.]

Petitioner carries the burden of proving his contentions. Hawk v. Olson, 326 U.S. 271, 179, 90 L.ed. 61, 67 (1945); Johnson v. Zerbst, 304 U.S. 458, 468, 82

L.Ed. 1461, 1468 (1938); Devers v. California, 422 F.2d 1263, 1264 (9th Cir.), cert. denied, 399 U.S. 913 (1970); Sampsell v. California, 191 F.2d 721, 723 (9th Cir. 1951); Carlson v. Landon, 186 F.2d 183, 188 (9th Cir. 1950). The weight of the burden placed on the Petitioner is that of proof by a preponderance of the evidence. Stepp v. Estelle, 524 F.2d 447, 455 (5th Cir. 1975); Williams v. Smith, 434 F.2d 592, 595 (5th Cir. 1970); Hall v. Warden, Maryland Penitentiary, 313 F.2d 483, 487 (4th Cir. 1963), cert. denied, 368 U.S. 867 (1961); Widmer v. Johnston, 136 F.2d 416, 418 (9th Cir.), cert. denied, 320 U.S. 780 (1943).

It is respectfully submitted that Petitioner has not sustained her burden and has not rebutted the presumption of the correctness of the State Court findings.

Accordingly, the People respectfully

urge that this Honorable Court discharge
the Writ of Habeas Corpus.

CECIL HICKS, DISTRICT ATTORNEY
of the COUNTY OF ORANGE, STATE
OF CALIFORNIA

MICHAEL R. CAPIZZI, ASSISTANT
DISTRICT ATTORNEY in Charge
of Special Operations

WILLIAM W. BEDSWORTH, DEPUTY
DISTRICT ATTORNEY HEAD OF
COURT, WRITS & APPEALS
SECTION

NINA R. BRICE, DEPUTY
DISTRICT ATTORNEY

Attorneys for Respondent
and Real Party in Interest

APPENDIX G

ENGROSSED STATEMENT ON APPEAL

APPENDIX G

IN THE MUNICIPAL COURT OF THE
CENTRAL ORANGE COUNTY JUDICIAL
DISTRICT, COUNTY OF ORANGE,
STATE OF CALIFORNIA

PEOPLE OF THE STATE)	
OF CALIFORNIA,	) CASE NO.79CM00607
)
Plaintiff/)
Respondent	) ENGROSSED
	) STATEMENT
vs.	) ON APPEAL
)
IRENE DOROTHY	) DATE FILED:
MUELLER,)
	) February 27, 1981
Defendant/)
Appellant)
)

The following statement is hereby settled and certified as the engrossed statement on appeal pursuant to Rule 187, California Rules of Court. A reporter's transcript of the trial proceedings have been filed, that transcript, consisting of 526 pages in three volumes, is hereby certified as the settled statement of the proceedings it purports to represent; an order having been entered in

pretrial proceedings by the Honorable Barbara Tam Thompson on January 31, 1980, denying defendant's Motion to Dismiss that order, appended hereto, is hereby incorporated into this statement and is made part of this engrossed statement on appeal.

The grounds upon which appellant will rely, in addition to those described in Rule 187(b) are:

1. The Court erroneously denied Defendant's non-statutory motion to discuss for denial of Due Process in the prosecution's failure to preserve evidence of the identity and location of a material and precipient witness for the defense.

2. The Court erroneously refused to charge the jury concerning several requested defense instructions.

Appellant was charged in Count I with a violation of Penal Code sections

484-88 (petty theft), in Count II with a violation of Section 240 (assault), and in Count III with a violation of Section 242 (battery).

On January 29, 1980, a motion to dismiss for failure to preserve evidence was heard by the Honorable Barbara Thompson. On January 31, 1980, Judge Thompson denied the motion and made specific written findings, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A".

On January 25, 1979, defendant exited J.C. Penney's store in Orange County carrying cosmetic items from the store in her purse. A Penney's security agent, Carol Manstrom, followed defendant and attempted to detain her for shoplifting the items. Defendant struck and kicked Carol Manstrom, giving rise to charges of

assault and battery. A scuffle ensued between the two women, until two men separated them. Although at the time of the hearing on defendant's motion to dismiss his identity was unknown, Carol Manstrom managed with some effort to locate one of the men, Michael Anderson, and he testified at trial for the prosecution. The other man accompanied the two women back into the store. The defendant asserted that this man had been in her proximity when she allegedly shoplifted the items, and when she allegedly left a twenty-dollar bill on the counter for the allegedly stolen items. Judge Thompson, however, found that credible evidence did not demonstrate a reasonable possibility that this man was a material witness to the petty theft charge.

The defense did demonstrate to Judge Thompson's satisfaction a

reasonable possibility that this second man was a material witness to the assault and battery. This witness separated the two females and asked for identification of the security officer. He then convinced Defendant that she should accompany him and the security officer back into the store for further investigation. He accompanied the defendant to the security office, and was present in the security office from the time the defendant arrived there until just before the police arrived.

While at the security office in the store, before any police officer had arrived, the defendant engaged in conversations with the man over a period of twenty minutes and learned that he had worked as a teacher in Pasadena. The man called his place of employment from the security office in the presence of the defendant to

explain that he would be late. As a result of that call, the defendant learned that the man may work at St. Joseph's Hospital.

By the time a police officer arrived the man had to leave, and he gave his business card to the officer and left without giving the officer a statement regarding what, if anything, he had seen. Because his shift had ended, that officer waited for another officer to arrive to take over the investigation of the case. The first officer's best recollection is that he gave the second officer the business card when he arrived. The second officer does not remember receiving a business card. The man's card contained no phone number and no address. The man's name and address were not included in any police reports. The court found that the loss

of the card was unintentional. He was never found.

CERTIFICATION

I hereby certify that the foregoing narrative statement, the order of the Honorable Barbara Tam Thompson appended hereto, and the Reporter's Transcript referred to above are true and correct as engrossed and are hereby made a part of the record on appeal.

Dated: February 11, 1981

KARL FRANK
JUDGE OF THE
MUNICIPAL COURT

APPENDIX H

ORDER DENYING MOTION TO DISMISS

APPENDIX H

MUNICIPAL COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE)	
OF CALIFORNIA,	)	NO. 79CM00607
)	
Plaintiff,	)	ORDER DENYING
	)	MOTION TO
vs.	)	DISMISS
)	
IRENE DOROTHY	)	DATE FILED:
MUELLER,)	
	)	January 31, 1980
Defendant.)	
)	

Defendant's motion to dismiss Counts I and II of the Complaint having come for hearing on January 28, 1980, before the Honorable Barbara Tam Thompson, E. Wallace Dingman, Deputy District Attorney, appearing on the behalf of the people, and Marv A. Stern appearing on behalf of Irene Dorothy Mueller.

The Court having considered oral argument, testimony, and the points and authority cited by the parties, the

Court now makes the following findings:

The Defense has demonstrated a reasonable possibility that the man in a leisure suit (hereinafter referred to as "X") is a material witness to the assault and battery. Credible evidence, however, does not demonstrate that there is a reasonable possibility that X is a material witness to the petty theft charge.

The standard in determining the People's responsibility for the absence of a material witness set forth in such cases as People vs. Hernandez (1978) 84 Cal.App.3d 408, In re Jesus B. (1977) 75 Cal.App.3d 444; and People vs. Flores (1976) 62 Cal.App.3d Supp.19 has not been satisfied. The Court bases this conclusion upon the following grounds:

First, Defendant had ample opportunity to discover X's name and

address. Credible evidence demonstrates that Defendant was not prevented from conversing with X, and did engage in conversation with him for approximately 20 minutes.

Second, Defendant's mistaken belief that the police would obtain X's identity is not sufficient justification to excuse Defendant from the responsibility of safeguarding her own interests, or to cause the police officers to serve as defense investigators.

Third, credible evidence demonstrates that Defendant was able to determine that X was a teacher like herself, and that he had possibly taught in Pasadena. Credible evidence also shows the Defendant was able to listen to X's phone conversation with his place of employment and, as a result, was able to determine that he

may work at St. Joseph's Hospital. Such ability indicates the Defendant was not suffering from such physical or mental distress as to be unable to determine X's identity.

Fourth, credible evidence demonstrates that the loss of X's card by the police was unintentional and was not tainted with the degree of wrongdoing set forth in the above-cited cases. Credible evidence further demonstrates that X's card is valueless as it did not contain an address or telephone number for X.

Based on the foregoing reasons, the Court denies Defendant's motion to dismiss the petty theft as well as the assault and battery charges.

Dated: January 31, 1980

Judge of the Central
Municipal Court

APPENDIX I

APPLICATION FOR CERTIFICATE

PROBABLE CAUSE

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,)	
)	
Petitioner,	)	NO. CV 82-2598CBM(K)
)	
vs.)	
	)	APPLICATION FOR
SUPERIOR COURT OF	)	CERTIFICATE OF
CALIFORNIA, COUNTY	)	PROBABLE CAUSE
OF ORANGE,)	
)	
Respondent,	)	DATE FILED:
)	
PEOPLE OF THE	)	November 22, 1982
STATE OF)	
CALIFORNIA,)	
)	
Real Party in)	
Interest.)	
)	

IRENE MUELLER, the above-named petitioner, respectfully shows the court:

The above-entitled court, by its order entered on November 4, 1982, denied the application of the above-named petitioner for a writ of habeas corpus. Petitioner desires to appeal from such order to the United

States Court of Appeals for the Ninth Circuit, and in order to take such appeal petitioner respectfully requests that this court issue a certificate of probable cause, pursuant to the provisions of Section 2253, Title 28, United States Code, and Rule 22(b) of the Federal Rules of Appellate Procedure.

Petitioner believes that she is entitled to redress on appeal, and petitioner further believes that a certificate of probable cause should issue in this case, on the following grounds:

1. Petitioner has shown that her Due Process Rights under the Fifth and Fourteenth Amendments were violated by law enforcement's failure to preserve material evidence that might have exculpated her of the alleged criminal charges. Petitioner has shown this

violation in her petition, traverse, and objections.

2. Petitioner has shown by credible evidence that a witness who observed the incident to which she was charged with and convicted of, was a favorable and necessary witness to her defense. Petitioner has attached trial transcripts to her traverse and objections which distinctly show that the witness observed not only the assault and battery but also the placing of money by petitioner on the store's counter. Both the police officer and petitioner testified under penalty of perjury that they were told by the witness that he had seen the entire incident.

3. Petitioner testified that the witness informed her that "he saw the entire thing, that she needn't be afraid." The witness was consoling

petitioner while she was being interrogated by the security guard. The witness was with petitioner for at least 10 minutes and then left. Petitioner was badly injured by the assault and was being interrogated while the witness was by her side; therefore, petitioner was not in a normal state of mind, nor was she able, to ascertain the identity of the witness herself.

4. Petitioner has shown that she could have received conceivable benefit regarding the witness' testimony because he was an eyewitness to, and an active participant in, the crime charged, so that there was a strong possibility that he could have provided material and relevant evidence concerning the events constituting the crime.

4. Petitioner has shown that this

favorable witness gave his business card to law enforcement and that law enforcement either intentionally or unintentionally lost the business card. Trial transcripts clearly show that the witness gave his business card to law enforcement. Federal law under United States v. Bryant, 439 F.2d 642, 651 states that law enforcement has a duty to disclose material evidence which is operative as a duty of preservation.

5. Consequently, petitioner has been denied her due process rights under the Federal Constitution to obtain a witness in her favor; a witness who would have testified to her innocence of the charges of which she was convicted. A witness who was physically and mentally capable of testifying to events that he had personally observed and whose testimony would have been relevant and material

to the defense.

Accordingly, the petitioner respectfully urges that this Honorable Court order a certification of Probable Cause.

Dated: November 18, 1982

Respectfully submitted,

James L. Vitek
Attorney for Petitioner

APPENDIX J

JUDGMENT (Proposed)

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,)	
)	
Petitioner,	)	NO. CV 82-2598CBM(K)
)	
vs.)	
	)	JUDGMENT
SUPERIOR COURT OF	)	(Proposed)
CALIFORNIA, COUNTY)	
OF ORANGE,	)	DATE FILED:
)	
Respondent,	)	November 1, 1982
_____)	

IT IS ADJUGED that the petition is dismissed.

Dated: This _____ day of
_____, 1982

RICHARD A. GADBOIS, JR.
United States District Judge

APPENDIX K

FINDINGS ON A PETITION
FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,)	
)	
Petitioner,	)	NO. CV82-2598CBM(K)
)	
vs.)	
	)	FINDINGS ON A
SUPERIOR COURT OF)	)	PETITION FOR WRIT
CALIFORNIA,COUNTY)	)	OF HABEAS CORPUS
OF ORANGE,	)	BY A PERSON IN
	)	STATE CUSTODY
Respondent,)	
)	

These findings are submitted to the United States District Judge pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

On May 26, 1982, petitioner, currently on probation after a state conviction, filed this petition for a writ of habeas corpus by counsel paying the filing fee.

The Magistrate called for a response which was filed on June 21,

1982. Petitioner filed a traverse on July 19th and the matter was submitted.

The Magistrate has read and considered the pleadings as well as the exhibits lodged and makes the following findings.

Petitioner alleges that she was denied a fair trial "because material evidence (i.e. a business card containing the name of a main witness) was lost by the police." It is further alleged that petitioner was denied a fair trial "because a police officer intentionally suppressed the material evidence (business card)."

It is alleged that the actions of the police denied petitioner the right to present favorable evidence on her behalf at trial.

Petitioner alleges that she was unable to ascertain the identity of the material witness because she was

suffering from physical and emotional injuries, was frightened and nervous and was in custody under lawful arrest.

Respondent cites 28 U.S.C. §2254(d) and attaches a certified copy of the Municipal Court's order denying petitioner's motion to dismiss the complaint after considering oral argument, testimony and points and authorities cited by the parties.

The state court found that, "The defense has demonstrated a reasonable possibility that the man in a leisure suit ... is a material witness to the assault and battery. Credible evidence, however, does not demonstrate that there is a reasonable possibility that [he] is a material witness to the petty theft charge." It was further found that, "Defendant had ample opportunity to discover [his] name and address. Credible evidence

demonstrates that defendant was not prevented from conversing with [him], and did engage in conversation with him for approximately 20 minutes." The opinion went on to find that there was not sufficient justification "to excuse defendant from the responsibility of safeguarding her own interests, or to cause the police officers to serve as defense investigators."

It was further found that "defendant was not suffering from such physical or mental distress as to be unable to determine [his] identify," and that "credible evidence demonstrates that the loss of [the] card by the police was unintentional ...". There was a further finding that this same evidence "demonstrates that [the] card is valueless as it did not contain an address or telephone number ...". The decision then went on to deny

the motion to dismiss the petty theft and assault charges of which petitioner was later convicted.

Petitioner states that the material facts were not adequately developed at the state court hearing and that therefore the 2254(d)(3) exception applies. Petitioner specifies that "the pertinent facts concerning the materiality of the business card of the material witness were not adequately developed at the state court hearing." A copy of the transcript (attached to the traverse) indicates that one of the witnesses testified that the card contained not only the name of the witness but also his address and telephone number.

Petitioner is correct that this factual determination is not "fairly supported by the record." 2254(d)(8).

However, petitioner's proof goes

to one portion of the findings of the state court. This does not necessarily invalidate the entire decision. There is no showing that the state court was in error when it found that the defendant had ample opportunity to discover the witness' name and address, that the defendant was not suffering from such physical or mental distress as to be unable to determine his identity and that the loss of the business card by the police was unintentional.

Assuming that the finding of the California Court that the lost card was not material is erroneous. There must still be some showing that the witness would testify in petitioner's favor in order to impose a duty on the police.

United States v. Agurs, 427 U.S. 97 (1976); Moore v. Illinois, 408 U.S. 786 (1972); Washington v. Texas, 388 U.S.

14 (1967) and Brady v. Maryland, 373 U.S. 83 (1963). Due process guarantees that a criminal defendant will be treated with fundamental fairness. In order to declare that it has been denied, there must be a finding that the absence of fairness fatally affected the trial. The acts complained of must be of such quality as necessarily prevent a fair trial. Lisenba v. California, 314 U.S. 219 (1941). The defendant has the duty to make some showing of materiality before sanctions may be imposed on the government for the innocent loss of evidence. United States v. Valenzuela-Bernal, ____ U.S. ____ (No. 81-450, July 2, 1982). There has been no showing that the witness would testify favorably to the defense in the instant case.

Whether or not the witness could

be of help to the defense is purely speculative as there appears to be no evidence indicating what his testimony would be beyond the fact that he stated that he saw what had occurred with regard to the assault charge.

Title 28 U.S.C. §2254(d) mandates that in a situation such as this, the Court shall presume that the findings of a state court of record are correct. Sumner v. Mata, 449 U.S. 539 (1981). Given the unassailed findings listed above, the Magistrate finds that petitioner has not demonstrated that she was deprived of any federally guaranteed rights, due process or otherwise.

The petition presents only issues of law. No evidentiary hearing will be necessary. It should be dismissed pursuant to 28 U.S.C. §2243.

IT IS THEREFORE RECOMMENDED that

an Order be issued by the Court
dismissing the petition.

Dated: This 18th day of October, 1982.

JOHN R. KRONENBERG
United States Magistrate

APPENDIX L

NOTICE OF APPEAL

APPENDIX L

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,)	
)	
Petitioner,	)	NO. CV 82-2598 CBM(K)
)	
vs.)	
	)	NOTICE OF APPEAL
SUPERIOR COURT OF)	
CALIFORNIA, COUNTY	)	DATE FILED:
OF ORANGE,	)	November 22, 1982
)	
Respondent,)	
)	
PEOPLE OF THE)	
STATE OF)	
CALIFORNIA,)	
)	
Real Party in)	
Interest.)	

NOTICE OF APPEAL

Notice is hereby given that Irene Mueller, petitioner above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order denying petitioner's application for a writ of habeas corpus entered in this proceeding on November 4, 1982.

Dated: November 18, 1982

James L. Vitek
Attorney for Petitioner

APPENDIX M

JUDGMENT

APPENDIX M

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,)	
)	
Petitioner,	)	NO. CV 82-2598 CBM(K)
)	
vs.)	
	)	JUDGMENT
SUPERIOR COURT OF)	
CALIFORNIA, COUNTY)	
OF ORANGE,)	
)	
Respondent,)	
)	

IT IS ADJUGED that the petition
is dismissed.

Dated: This 1st day of November,
1982.

Richard A. Gadbois, Jr.
United States District
Judge

APPENDIX N

ORDER

APPENDIX N

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,)	
)	
Petitioner,	)	NO. CV 82-2598 CBM(K)
)	
vs.)	
	)	ORDER
SUPERIOR COURT OF)	
CALIFORNIA, COUNTY	)	DATE FILED:
OF ORANGE,)	
	)	November 1, 1982
Respondent,)	
)	

Pursuant to 28 U.S.C. §636, the Court having reviewed the records and pleadings, the objections as well as the Findings of the United States Magistrate, concurs with and adopts those findings and conclusions.

Each party wil bear its own costs.

IT IS ORDERED that the Clerk of this Court shall serve a copy of the Judgment, of this Order and of the Findings of the United States Magistrate via United States mail upon the petitioner through her

counsel and upon the respondent through
its counsel.

DATED: This 1st day of November, 1982

Richard A. Gadbois, Jr.
United States District Judge

APPENDIX O

ORDER DENYING APPLICATION FOR
CERTIFICATE OF PROBABLE CAUSE

APPENDIX O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,	)	NO. CV 82-2598 CBM(K)
)	
Petitioner,	)	ORDER DENYING
	)	APPLICATION FOR
vs.	)	CERTIFICATE OF
	)	PROBABLE CAUSE
SUPERIOR COURT OF)	
CALIFORNIA, COUNTY	)	DATE FILED:
OF ORANGE,)	
	)	November 29, 1982
Respondent,)	
)	

Pursuant to U.S.C. §636 and §2253, the Court has reviewed the Application for Certificate of Probable Cause and the Findings on a Petition for Writ of Habeas Corpus of the United States Magistrate submitted on October 18, 1982 and adopted by the Court in support of its judgment of dismissal entered on November 14, 1982 and finds that the Motion is frivolous and without merit.

Pursuant to 28 U.S.C. §1915(a), this Court certifies that the appeal is not taken in good faith for the reasons set

forth in the aforesaid Findings on file herein.

IT IS ORDERED that the Application is denied.

DATED: This 29th day of November.

Richard A. Gadbois, Jr.
United States District
Judge

APPENDIX P

ORDER

APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRENE D. MUELLER,	)	NO. 83-8008
)	
Petitioner,	)	DC# CV 82-2598 CBM(K)
	)	Central California
vs.)	
	)	ORDER
SUPERIOR COURT OF)	
CALIFORNIA, COUNTY	)	DATE FILED:
OF ORANGE,)	
	)	February 9, 1983
Respondent,)	
)	
PEOPLE OF THE)	
STATE OF)	
CALIFORNIA,)	
)	
Real Party in)	
Interest.)	

Before: ANDERSON and HUG,
Circuit Judges

The Court has received and reviewed the district court record and construes the same as a request for a certificate of probable cause pursuant to Fed. R. App. P. 22(b). The request is denied.